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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1483

SUPERMARKETS GENERAL CORPORATION T/A
HOCHSCHILD KOHN DEPARTMENT STORE,
Appellant,

v.

STATE OF MARYLAND,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF MARYLAND

JURISDICTIONAL STATEMENT

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v.

STATE OF MARYLAND,

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ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

JURISDICTIONAL STATEMENT

Appellant Supermarkets General Corporation t/a Hochschild Kohn Department Store appeals from a decision of the highest court of Maryland upholding a Maryland statute and appellant's conviction thereunder against challenges based upon the federal constitution. Appellant urges plenary consideration of the questions presented with briefs and oral argument.

OPINION BELOW

The opinion below was filed on December 24, 1979, and is reported as *Supermarkets General Corp. v. Maryland,* Md. , 409 A.2d 250 (1979). The slip opinion is reprinted at pages A.1-18 of the Appendix.

JURISDICTION

On April 9, 1979, appellant was convicted of violating the Sunday closing law applicable in Anne Arundel County, Maryland, codified at *Md. Ann. Code* art. 27, § 534N (1976). On December 24, 1979, the Court of Appeals of Maryland affirmed the conviction and upheld the statute against federal constitutional challenges raised both at trial and on appeal.

On March 19, 1980, notices of appeal were filed with the clerk of the Court of Appeals of Maryland and the clerk of the Circuit Court of Maryland for Anne Arundel County which is possessed of the record. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1257(2). *Reconstruction Finance Corp. v. Beaver County,* 328 U.S. 204 (1946); *Dahnke-Walker Milling Co. v. Bondurant,* 257 U.S. 282, 288-90 (1921).

STATUTE INVOLVED

The statute at issue is codified in Article 27, § 534N of the Annotated Code of Maryland, and is reprinted at A.18-19 of the Appendix.

QUESTIONS PRESENTED

I. Whether appellant's conviction for violating a Maryland Sunday closing law is a denial of equal protection of the law because appellant is part of a class whose selection rests on grounds wholly irrelevant to the state's objective.

II. Whether appellant's conviction for violating a Maryland Sunday closing law is a denial of due process of law because the statutory scheme no longer bears any reasonable relation to the state's objective.

STATEMENT OF THE CASE

By information filed on December 13, 1978, appellant was charged with conducting the business of a retail establishment on Sunday in violation of Article 27, § 534N of the Annotated Code of Maryland (R. 2). Thereafter, appellant filed a motion to dismiss, contending that the statute violated its rights to equal protection and due process of law in violation of the fourteenth amendment (R. 15). The motion was denied (R. 95).

On April 9, 1979, trial in the Circuit Court of Maryland for Anne Arundel County proceeded on agreed facts. These showed that on Sunday, December 10, 1978, appellant, trading as Hochschild Kohn Department Store at Harundale Mall in Anne Arundel County, Maryland, conducted business for profit in the usual manner for the general public. At least ten of appellant's employees were engaged in the public sale of general merchandise, including household goods and clothing, during a single shift. Essentially upon these facts, appellant was convicted and fined (A. 20).

On May 9, 1979, appellant filed a timely order for appeal to the Court of Special Appeals of Maryland. Thereafter, appellant filed a petition for writ of certiorari with the Court of Appeals of Maryland. On August 17, 1979, before consideration by the Court of Special Appeals, the Court of Appeals granted certiorari and consolidated this action with appeals from other convictions under Maryland blue laws in Anne Arundel and Baltimore Counties.

On appeal, appellant again contended that Article 27, § 534N deprived it of equal protection and due process of law under the fourteenth amendment to the United States Constitution. On December 24, 1979, the Court of Appeals of Maryland affirmed the convictions of appellant and the others whose cases had been consolidated. In so doing, the court rejected appellant's federal constitutional claims, stating: "We hold that . . . § 534 N do[es] not deny equal protection or due process of law." (A. 13).

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

Not since *McGowan v. Maryland,* 366 U.S. 420 (1961), and its companion cases were decided on May 29, 1961, has this Court rendered any opinion upon the constitutionality of Sunday closing laws.[1] State court decisions purporting to apply the same federal constitutional principles have reached conflicting results. *Compare, e.g., Caldor's, Inc. v. Bedding Barn, Inc.,* 40 *Conn. L.J.* 41, p. 10 (Conn. April 10, 1979), *Kroger Co. v. O'Hara Township,* 481 Pa. 101, 392 A.2d 266 (1978),[2] *and New York v. Abrahams,* 40 N.Y.2d 277, 353 N.E.2d 574 (1976), *with Supermarkets General Corp. v. Maryland,* ____ Md. ____, 409 A.2d 250 (1979), *and Gibson Products Co. v. Texas,* 545 S.W.2d 128 (Tex. 1976), *cert. denied,* 431 U.S. 955 (1977). In *Caldor's, supra* at 11, the Supreme Court of Connecticut noted: "State cases after *McGowan* . . . continue to be divided." *See id.* at 11-12, and the 28 cases therein cited; *Kroger, supra,* 481 Pa. at 109-10, 392 A.2d at 270, and the 19 cases therein cited.

[1] The Court has dismissed appeals in several such cases. *E.g.,* Bertera's Hopewell Foodland, Inc. v. Masters, 428 Pa. 20, 236 A.2d 197 (1967), *appeal dismissed,* 390 U.S. 597 (1968); South Carolina v. Solomon, 245 S.C. 550, 141 S.E.2d 818, *appeal dismissed,* 382 U.S. 204 (1965).

[2] *But see* note 5 *infra.*

Since *McGowan* was decided, the Maryland scheme of Sunday closing laws has been dramatically altered. *Compare McGowan, supra,* 366 U.S. at 453-59 ("APPENDIX TO OPINION OF THE COURT"), *with Md. Ann. Code* art. 27, §§ 492-534V (1976 & Cum. Supp. 1979). *See Steimel v. Board of Election Supervisors of Prince George's County,* 278 Md. 1, 9-10, 357 A.2d 386, 390-91 (1976). The most serious alteration is that by reason of referenda which the state legislature permitted in some counties but not others, there are no requirements in three counties that any retail merchants be closed on Sunday. *Md. Ann. Code* art. 27, §§ 492(1), 521(k), and 522(1) (1976 & Cum. Supp. 1979) (Dorchester County), 534G & 534H (1976 & Cum. Supp. 1979) (Prince George's County) and 534I & 534J (1976 & Cum. Supp. 1979) (Montgomery County). In one other county, a referendum was granted and held with the closing laws being rejected only in certain election districts, *see* Editor's Note following *Md. Ann. Code* art. 27, § 534T (1976), but the state legislature thereafter repealed the Sunday closing requirements throughout the county. *Id.,* § 534T (Cum. Supp. 1979). Additionally, unlike the statutory scheme at issue in *McGowan,* the Maryland blue laws now are riddled with exceptions so pervasive as to nullify their purpose of providing a common day of rest for *all* citizens and an atmosphere of tranquility in which to enjoy it. *McGowan, supra,* 366 U.S. at 449-50, *quoted with approval in Giant of Maryland, Inc. v. State's Attorney for Prince George's County,* 267 Md. 501, 509-10, 298 A.2d 427, 432, *appeal dismissed,* 412 U.S. 915 (1973); *Atlantic Dep't Store, Inc. v. State's Attorney for Prince George's County,* 22 Md. App. 381, 384, 323 A.2d 617, 619 (1974).

As discussed below, appellant submits that in upholding Maryland's Sunday closing laws, the Court of Appeals misapplied *McGowan*'s principles. For this reason and in order to resolve numerous, conflicting state court decisions, including Maryland, this case is worthy of review.

I. BECAUSE APPELLANT IS PART OF A CLASS WHOSE SELECTION RESTS ON GROUNDS WHOLLY IRRELEVANT TO THE STATE'S OBJECTIVE, ITS CONVICTION FOR VIOLATING A MARYLAND SUNDAY CLOSING LAW IS A DENIAL OF EQUAL PROTECTION OF THE LAW.

II. BECAUSE THE STATUTORY SCHEME NO LONGER BEARS ANY REASONABLE RELATION TO THE STATE'S OBJECTIVE, APPELLANT'S CONVICTION FOR VIOLATING A MARYLAND SUNDAY CLOSING LAW IS A DENIAL OF DUE PROCESS OF LAW.

In *McGowan*, this Court stated the framework for analyzing whether a statute violates the equal protection clause as follows:

> [T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

366 U.S. at 425-26.

The framework for due process analysis is whether a statute bears a reasonable relation to a legitimate state objective. *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 124-25 (1978). According to the Court of Appeals, "the companion contentions of equal protection and due process mesh. There is no practical distinction between the grounds on which the two contentions are argued, and determination of one will resolve the other." (A. 6).

In Anne Arundel County, Maryland, large retail merchants such as appellant are criminally liable for conducting business as usual on Sundays. However, in Dorchester, Montgomery, Prince George's and Worcester Counties,

they are not. In light of the state's purpose to provide a common, statewide day of rest and an atmosphere of tranquility in which to enjoy it, allowing large retail merchants in certain counties (but not others) to do business on Sunday is worse than "wholly irrelevant to the achievement of the State's objective." *McGowan, supra,* 366 U.S. at 428. It is contrary to the objective:

> We think, and therefore hold, the Act conforms with the *Maryland scheme* as delineated by the Supreme Court in [*McGowan*]. *The operation of large commercial markets or department stores on Sunday would materially interfere with the recreational atmosphere of the day,* while small retail operations will not.

Rebe v. State's Attorney for Prince George's County, 262 Md. 350, 357-58, 277 A.2d 616, 619 (1971) (emphasis added).

The Court of Appeals has stated that "the matter of Sunday closings remains in the General Assembly," which "'may itself determine such an issue for each of its local subdivisions, having in mind the needs and desires of each.'" (A. 10). However, contrary to this approach, the matter of Sunday closings did not rest with the General Assembly with respect to the three favored counties which were allowed to decide the issue by referendum. Ch. 878, § 2 [1975] Md. Laws 3596 (Montgomery County); ch. 861, § 2 [1975] Md. Laws 3552 (Prince George's County) and ch. 652, § 4 [1974] Md. Laws 2213 (Dorchester County). A fourth county also was favored with a referendum, ch. 562, § 2 [1974] Md. Laws 1916 (Worcester County), but after it yielded a mixed result, the legislature nullified the result of the referendum, ch. 653, § 3 [1977] Md. Laws 2653, and repealed the closing law throughout the county. *Id.*, § 2. Other counties were not granted the right of referendum.[3]

[3] However, the legislature continued to discriminate arbitrarily among Maryland counties during its 1979 session by granting the right to repeal by referendum the current Sunday closing laws in Talbot County, Ch. 523, § 2 [1979] Md. Laws 1503.

There is no rational basis to favor some counties and not others with the right to decide the matter by referendum.[4] Therefore, territorial discrimination by the legislature in selectively granting the right to vote on Sunday closing laws is facially unreasonable and a denial of equal protection. Since Article 27, § 534N is a product of this discrimination, it should be invalidated. *Cf. Vornado, Inc. v. Hyland,* 77 N.J. 347, 350-51, 390 A.2d 606, 608 (1978), *appeal dismissed,* 439 U.S. 1123 (1979) (State blue law "effective only in counties which choose to adopt it by referendum"); *Malibu Auto Parts, Inc. v. Virginia,* 218 Va. 467, 472, 237 S.E.2d 782, 786 (1977) (State blue law "permits a county or city, by ordinance and public referendum," to nullify its effect "within such locality").

In *McGowan,* this Court considered the entire scheme of Maryland "blue laws" in terms of the statewide objectives "'to compel a day of rest from work, permitting only activities which are necessary or recreational'" and "to set one day apart from all others . . . which *all* members of the family and community have the opportunity to spend and enjoy together, a day on which there exists relative quiet and disassociation from the everyday intensity of commercial activities, a day on which people may visit friends and relatives who are not available during working days." 366 U.S. at 449-50 (emphasis added). Although the Court recognized that Maryland closing laws could vary county by county, *id.* at 426, those laws, contrary to the present scheme, were uniform in effectively prohibiting large retail operations on Sunday (except for the sale of recreational commodities or necessities).

In its opinion below the Court of Appeals, for the first time, viewed the objective of the Maryland Sunday closing laws as variable to accommodate "the needs and desires of

[4] Maryland counties and cities are not empowered to exempt themselves from the operation of the public blue laws. Such a local option can only be granted by the state legislature. *See* (A. 10); *Steimel, supra,* 278 Md. at 6-10, 357 A.2d at 389-91.

each" county, rather than as uniform to achieve a statewide day of rest for all citizens. *See* (A. 10 & 12). The court stated:

> The short of it is that as we read *McGowan* the purpose of providing a day on which there shall be a lesser degree of business activity is a valid reason for Sunday closing laws, and the fact that persons in different areas of the State have different desires and needs with respect to the extent of business activity in their areas does not create unreasonable classifications. Consequently, the desire of the populace of a few counties to have no reduction in commercial activity on Sunday whatsoever, does not, under the principles of *McGowan,* require any different result.

(A. 12). However, this ignores that in the favored counties, citizens were given the right to express their "desires and needs" through referendum. In other counties they were not. Although the state legislature's practice of deciding the scope of Sunday closing laws in each county has been held permissible (A. 10), this practice has been eroded by giving arbitrarily selected counties the right of referendum. This right should have been granted evenhandedly to citizens of all counties, especially since "statewide" application of Sunday closing laws in Maryland has been the objective since colonial times. *Steimel, supra,* 278 Md. at 8-10, 357 A.2d at 390-91.

If the traditional objective of a statewide day of rest remains viable, then the exclusion of four counties from the Sunday closing requirements is "wholly irrelevant" to its achievement, and the statutory scheme violates the equal protection and due process clauses. If there is a new objective to conform to the "needs and desires of each" county, it has been applied arbitrarily, because some counties were granted the right to decide for themselves and others were not. Either way, the challenged legislation is invalid.

Sunday closing laws far less discriminatory than Maryland's have been struck down in other states. For example,

in *Kroger, supra,* 481 Pa. at 116, 392 A.2d at 273, the Supreme Court of Pennsylvania held:

> It is one thing to legislate exceptions in order to achieve a coherent statute which furthers the end of a uniform day of rest and recreation for all. However, when a law which prohibits business activity is riddled with exception after exception, a time comes when the general scheme is so diluted that it violates the equal protection of the laws. That time is today.[5]

Similarly, in *Abrahams, supra,* 40 N.Y.2d at 285, 353 N.E.2d at 578, the Court of Appeals of New York invalidated New York's blue laws, noting: "The challenged [blue law] contains a polyglot of exceptions to the general closing mandate which is essentially devoid of rhyme or reason." Likewise, to the argument that "the legislature might reasonably have found compelling governmental, economic, or social reasons for the act's pattern of exemptions," the Supreme Court of Connecticut in *Caldor's* responded:

> [A]n act designed to further a common day of rest cannot be justified by other unspecified governmental, economic, or social reasons. The plaintiffs' argument only demonstrates once again the ambiguity inherent in the objective of Sunday closing laws. In our complex modern society, it is difficult for legislatures to achieve consensus about rest and recreation without becoming enmeshed in distinctions and discriminations that unfairly impose penal sanctions on legitimate commercial enterprises.

Caldor's, supra at 17.

The common rationale of these decisions was well summarized in *Abrahams*. There, although noting that "one must be wary that assertions of irrationality are not simply reflections in the eye of the beholder," the court stated:

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[5] Although the court's holding was based upon the Pennsylvania Constitution, it was largely premised upon principles of equal protection under the fourteenth amendment of the United States Constitution.

> [W]here a statute encompasses a haphazard and anachronistic amalgamation of exceptions lacking discernible connection to the law's purpose, it cannot be judicially condoned. There is no question but that the Legislature could find that the sale of certain commodities or the rendering of certain services on Sunday are both necessary and desirable. . . . Even if these exceptions result in what appears to be a form of statutory discrimination that is arbitrary, the statute should not be judicially disturbed if found to be justified and related to the legislative objective. However, legislative leeway should never be permitted to extend to the promulgating of statutes which are utterly lacking in cohesive scheme. When classifications are not only arbitrary but also irrational they transgress the broad prerogatives of the Legislature.

40 N.Y.2d at 285, 353 N.E.2d at 578 (citations deleted).

The blue laws struck down in Connecticut, New York and Pennsylvania were relatively simple statutes of uniform statewide application compared to the Maryland blue laws which have been described as "unnecessarily befuddling statutory crabgrass" (A. 17), and which create, on their face, a plethora of irrational exceptions. *E.g., Md. Ann. Code* art. 27, §§ 521 (Cum. Supp. 1979) (ostensibly statewide closing law exempting by its own terms, in whole or in part, more than half of Maryland's counties) and 495 & 496 (1976) (allowing exhibition of movies in Frederick County on Sunday between *8:00* P.M. and midnight, yet providing a fine of up to $100 for their exhibition on Sunday between 6:00 and *8:30* P.M.). *Compare id.*, § 521(a) (forbidding Sunday sale of books) *with id.*, § 521(d) (permitting Sunday sale of periodicals). If the highest courts of Connecticut, New York and Pennsylvania were correct in invalidating their state blue laws, *a fortiori* the Maryland blue laws should be invalidated. At the very least, the issues raised merit this Court's review. order to resolve the conflicting application of federal

CONCLUSION

Numerous state courts have reached conflicting results as to the constitutionality of Sunday closing laws, whose violation subjects the offender to criminal sanctions. In order to resolve the conflicting application of federal constitutional principles to such laws nationwide, this case is worthy of review.

Respectfully submitted,

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March 21, 1980

APPENDIX

In The
Court of Appeals of Maryland

Nos. 63 and 72

September Term, 1979

No. 63
Supermarkets General Corporation
t/a Hochschild Kohn Department
Store et al.

v.

State of Maryland

No. 72
Toys "R" Us, Inc., Store 511

v.

State of Maryland

Smith, Digges, Eldridge, Orth, Cole, Davidson, JJ.

Opinion by Orth, J.

Filed: December 24, 1979

We hold that § 534 L and § 534 N of Article 27, Code (1957, 1976 Repl. Vol.) are constitutionally valid. The sections are two of the criminal statutes collected under

the subtitle "Sabbath Breaking," composed of §§ 492-434V [sic], which are commonly known as Sunday Blue Laws or Sunday Closing Laws.

Section 534 L concerns Sunday activities in Baltimore County. Subject to exceptions specifically designated, subsection (a) prescribes that "it is unlawful on Sunday for any wholesale or retail establishment to conduct business for labor or profit in the usual manner and location or to operate its establishment in any manner for the general public. It shall not cause, direct, or authorize any employee or agent to engage in or conduct business on its behalf on Sunday." Subsection (b) excepts (1) drug stores whose principal business is the sale of drugs and related items, (2) delicatessens, (3) bakeries, (4) gasoline stations, and (5) restaurants. Subsection (c) provides that nothing in the section shall apply to (1) farmers, (2) nurserymen, and (3) "Any business with not more than six (6) persons on any shift on Sunday." Subsection (d) makes the section inapplicable "to any person who by reason of his religious conviction observes a day other than Sunday as his day of rest and actually refrains from labor or secular business on that day." The term "a day other than Sunday" is defined as "any consecutive twenty-four hour period." Any establishment which offers service as its primary business, subsection (e), and industries "where continuous processing or manufacturing is required by the very nature of the process involved," subsection (f), are allowed to operate on Sunday, and subsection (g) permits all recreational activities, sports, and amusements on Sunday. Subsection (h) expressly disclaims that the section amends any other provision of law with reference to prohibition of Sunday activities and specifically declares that the section shall not be construed so as to permit new or used car dealer [sic] to dispose of any motor vehicle. Subsection (i) authorizes the State's Attorney of Baltimore County to petition the Circuit Court for Baltimore County to enjoin any violation. Subsection (j) makes any violation a misdemeanor and establishes fines as punishment upon conviction, except that no employee or agent who has been caused or directed by his employer to violate the provisions of the section may be fined.

Section 534 N concerns Sunday activities in Anne Arundel and Calvert counties. It tracks § 534 L with these differences: dealers in boats and boating equipment, and fishing equipment and supplies are added to the exempted businesses, subsection (b) 6; nothing in the section applies to any business with not more than eight persons on any one shift on a Sunday, subsection (c) 3; and the fines authorized upon conviction are different, subsection (j).

I

We are called upon to determine the constitutional validity of the two statutes by reason of the convictions of four retail sales establishments for committing misdemeanors proscribed by them.[1] Scott's Corporation and Stewart and Company were charged with violating § 534 L by operating a business on Sunday in Baltimore County with more than six persons on a shift. Supermarkets General Corporation, trading as Hochschild Kohn Department Store, and Toys "R" Us, Inc., Store 511, were charged with violating § 534 N by operating a business in Anne Arundel County with more than eight persons on a shift. At separate trials in the District Court of Maryland, Scott's and Stewart were found guilty and fined. Each noted an appeal to the Circuit Court for Baltimore County. The cases were consolidated and tried *de novo*. The defendants were again convicted and fined. We granted their petitions for certiorari. At separate trials in the Circuit Court for Anne Arundel County, Hochschild Kohn and Toys were found guilty and fined. Each noted an appeal to the Court of Special Appeals. We granted certiorari before decision by that court and consolidated all four cases. At each trial the contention that the statutes

[1] For the nature and extent of the power of the Maryland judiciary with respect to review of constitutional issues *see*, Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124, 98 S. Ct. 2207 (1978), citing Ferguson v. Skrupa, 372 U.S. 726, 731, 83 S. Ct. 1028 (1963); City of Baltimore v. State, 281 Md. 217, 230, 378 A.2d 1326 (1977); Perkins v. Eskridge, 278 Md. 619, 624, 366 A.2d 21 (1976); Consolidated Eng. Co. v. Cooper, 246 Md. 610, 615, 228 A.2d 823 (1967); McGowan v. State, 220 Md. 117, 124, 151 A.2d 156 (1959), *aff'd*, 366 U.S. 420 (1961).

were unconstitutional was duly raised and rejected by the court.

With respect to the constitutional issues, each of the appellants challenges the statute under which it was convicted on the grounds that it violates equal protection of the law and due process of law under the Fourteenth Amendment to the Constitution of the United States and under Article 24 of the Declaration of Rights, Constitution of Maryland. Toys also contends that the Sunday Blue Laws are laws respecting an establishment of religion prohibited by the First Amendment to the federal constitution and Article 36 of the Maryland Declaration of Rights. Scott's and Stewart further claim that § 534 L creates a monopoly in contravention of Article 41 of the Maryland Declaration of Rights.

II

It is patent that the enactment of Sunday Closing Laws is an exercise of the State's police power.

> Throughout this century and longer, both the federal and state governments have oriented their activities very largely toward improvement of the health, safety, recreation and general well-being of our citizens. Numerous laws affecting public health, safety factors in industry, laws affecting hours and conditions of labor of women and children, week-end diversion at parks and beaches, and cultural activities of various kinds, now point the way toward the good life for all. Sunday Closing Laws, like those [of Maryland] have become part and parcel of this great governmental concern wholly apart from their original purposes or connotations. [*McGowan v. State of Maryland*, 366 U.S. 420, 444-445, 81 S. Ct. 1101 (1961).][2]

[2] Mr. Chief Justice Warren delivered the majority opinion. Mr. Justice Frankfurter, whom Mr. Justice Harlan joined, filed a separate opinion. McGowan v. State of Maryland, 366 U.S. 459, 81 S. Ct. 1153 (1961). Mr. Justice Douglas wrote a dissenting opinion. 366 U.S. at 561.

Hereinafter, unless otherwise indicated, reference to *McGowan* is to the majority decision of the Supreme Court of the United States.

The basic rule is that there is a presumption of the constitutional validity of statutes. We put it thus in *Edgewood Nursing Home v. Maxwell*, 282 Md. 422, 483 A.2d 748 (1978):

> A statute enacted under the police power carries with it a strong presumption of constitutionality and the party attacking it has the burden of affirmatively and clearly establishing its invalidity; a reasonable doubt as to its constitutionality is sufficient to sustain it. . . . In other words, the legislature is presumed to have acted within constitutional limits so that if any state of facts reasonably can be conceived that would sustain the constitutionality of the statute, the existence of that state of facts as a basis for the passage of the law must be assumed. [*Id.* at 427.]

Accord: Condominium Owners v. Supervisor, 283 Md. 29, 388 A.2d 116 (1978); *Davidson v. Miller*, 276 Md. 54, 69-70, 344 A.2d 422 (1975), *quoting Salsburg v. Maryland*, 346 U.S. 545, 553 n.9, 74 S. Ct. 280 (1954).

At the hub of appellants' equal protection and due process contentions is that the exceptions of the various commodities, businesses and persons from the Sunday prohibitions are without rational and substantial relation to the object of the legislation and, therefore, are arbitrary, oppressive and unreasonable. The standards under which this proposition is to be evaluated with respect to equal protection have been often set forth, although no precise formula has been developed. It is that

> the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.]*McGowan*, 366 U.S. at 425-426.]

This statement is in practical effect an iteration of the rational basis test used in equal protection analysis and the Supreme Court's application of it to Sunday closing laws serves as clear indication that such laws do not involve a fundamental right nor do they operate to the peculiar disadvantage of a suspect class. *See Wheeler v. State,* 281 Md. 593, 600-603, 380 A.2d 1052 (1977), *cert. denied, Maryland v. Wheeler,* 435 U.S. 997 (1978).

The test for constitutionality under the due process clause is

> whether a statute, as an exercise of the state's police power, bears a real and substantial relation to the public health, morals, safety, and welfare of the citizens of this state. The exercise by the Legislature of the police power will not be interfered with unless it is shown to be exercised arbitrarily, oppressively or unreasonably. [*Bowie Inn v. City of Bowie,* 274 Md. 230, 236, 335 A.2d 679 (1975).]

Thus, the companion contentions of equal protection and due process mesh. There is no practical distinction between the grounds on which the two contentions are argued, and determination of one will resolve the other.

The objective of the Maryland Sunday Closing Laws has been determined. In the *McGowan* decision of this Court, we said that

> the basic purpose of such statutes, with their exceptions, is the civil establishment and regulation of a day of rest from work. . . . The legislative plan is plain. It is to compel a day of rest from work, permitting only activities which are necessary or recreational. [220 Md. at 122-123.]

The Supreme Court of the United States accepted this Court's determination that the statutes' purpose and effect was "to set aside a day of rest and recreation." *McGowan,* 366 U.S. at 449.

In light of the objective of the legislation, we evaluate the constitutionality of the two practically identical sta-

tutes under the principles above set out. It would seem that the General Assembly could reasonably find that the exemption of the operation on Sunday of the specified establishments and businesses and the exceptions as to the designated classes of persons were necessary in the counties concerned, either for the health of the populace or for the enhancement of the recreational atmosphere of the day. The excepted retail establishments are all directly related to health or recreation. The rational basis for excepting industries where continuous processing or manufacturing is necessary by the very nature of the process involved, and for excepting farms and nurserymen whose chores must be performed seven days a week, needs no explication. The limitation of the number of persons on a shift assures that a number of employees of large establishments will be afforded the day of rest sought by the laws. We see no invidious discrimination in § 534 L and § 534 N.

Our view is supported by both our *McGowan* decision and its affirmation by the Supreme Court. In that case § 521, as then in effect, generally prohibiting retail sales on Sunday, excepted, as to Anne Arundel County, the sale of certain commodities, and the operation of specified businesses, including those with only one employee exclusive of the owner. The law was attacked on equal protection and due process grounds. We recognized that "[t]here can be, and often are, sharp differences of opinion as to what is necessary and what is proper or preferred recreation, but the answers must be given by the legislature, and if they are not clearly arbitrary or oppressively discriminatory, the legislative choices must be sustained." 220 Md. at 123. The Supreme Court agreed. It had no difficulty in finding a rational basis for the classifications. 366 U.S. at 425-428.

Cases of this Court since *McGowan* support our position. In *Richards Furniture v. Board*, 233 Md. 249, 196 A.2d 621 (1964) the attack on § 521 was renewed on equal potection and due process grounds because of an amendment which provided that "every market or department store in which

stalls or departments are rented or concessions given to individual merchants or vendors shall be considered as one establishment." We noted that *McGowan* found the basic portion of the act to be constitutional and believed that, with the amendment, it still conformed to the Maryland scheme. "The operation of large commercial markets or department stores on Sunday would materially interfere with the recreational atmosphere of the day, while small retail operations will not. And we think the classifications prescribed by the Act are reasonable and proper and are not of an invidious nature, . . . being designed to prohibit on Sundays large commercial operations. . . ." *Id.* at 263-264.

In *Rebe v. State's Attorney*, 262 Md. 350, 277 A.2d 616 (1971) we considered the constitutional validity of § 534 H, as then in effect, which pertained to Prince George's County. It was in substance the same as present §§ 534 L and 534 N and included as subsection (c)3 the exemption of a "[s]mall business with not more than six (6) persons on any one shift with the exceptions of persons or retailers engaged in the sale of automobiles." We relied on the constitutional principals enunciated in *McGowan* and *Richards* in concluding that the classification of § 534 H(c)3 was reasonable and proper, not of an invidious nature, and well calculated to achieve the legislative purpose of providing a day of rest for working persons and an atmosphere of tranquility in which to enjoy it. *Id.* at 358. We cited *Rebe* with approval in *Giant of Md. v. State's Attorney*, 267 Md. 501, 517, 298 A.2d 427, *appeal dismissed*, 412 U.S. 915 (1973).

Dart Drug Corp. v. Hechinger Co., 272 Md. 15, 320 A.2d 266 (1974) dealt with § 534 J, as then in effect, relating to Sunday activities in Montgomery County, and which was similar to the sections now before us and to former § 534 H, the subject of *Rebe*. We disposed of the constitutional issue summarily with the assertion that "[p]rovisions comparable to that contained in Section 534 J have consistently survived attack on constitutional grounds." *Id.* at 20.

Appellants do not profess to quarrel with *McGowan's* holdings. In oral argument before us they stated that it was important to emphasize what these appeals were not; they declared that the appeals were "not an attempt to reargue or overturn *McGowan*." It seems that the appellants are content to consider *McGowan* as sound law with respect to the Blue Laws as they then existed. They urge, however, that *McGowan* was not dispositive of their equal protection, due process and establishment of religion issues at the time they were convicted because amendments subsequent to that decision had materially changed the Blue Laws with respect to many of the counties. They contend that they were denied equal protection and due process because the conduct for which they were found to be criminally liable in Baltimore County and Anne Arundel County is permitted as lawful in Montgomery, Prince George's, Worcester and Dorchester counties. They point to the great and ever increasing number of exceptions in the Blue Laws and suggest that the classifications now rest on grounds wholly irrelevant to the achievement of the State's objectives, rendering the statutes arbitrary and capricious as having no rational basis. This notion is without merit. A comparable contention was presented in *McGowan*, namely that a statutory arrangement which permitted only certain Anne Arundel County retailers to sell specified merchandise was contrary to equal protection because it discriminated unreasonably against retailers in other Maryland counties. 366 U.S. at 427. The Court, fully cognizant of the "myriad of exceptions for various counties, districts of counties, cities and towns throughout the State," *id* at 424, commented in answer to the contention:

> But we have held that the Equal Protection Clause relates to equality between persons as such, rather than between areas and that territorial uniformity is not a constitutional prerequisite. With particular reference to the State of Maryland, we have noted that the prescription of different substantive offenses in different counties is generally a matter for legislative discretion. [*Id.* at 427.]

It found "no invidious discrimination here." *Id.* This view is buttressed by the realization that there is no doubt that Maryland could validly grant home rule to each of its 23 counties and to the City of Baltimore to determine the extent of Sunday closings by local option.[3] *See Salsburg v. State of Maryland*, 346 U.S. 545, 552, 74 S. Ct. 280 (1954). It is true that with one exception, Maryland had not, in fact, granted home rule powers in regard to Sunday closings. We have found that the General Assembly did not include the enactment of Sunday Blue Laws in the Express Powers Act (Code, 1957, 1973 Repl. Vol., 1979 Cum. Supp.) Art. 25A, § 5, enacted pursuant to the Home Rule Amendment, Art. XI-A, Md. Const. The power has been granted specifically to only one home rule subdivision, the City of Baltimore, by Acts 1931, ch. 287. *Steimel v. Board*, 278 Md. 1, 10-11, 357 A.2d 386 (1976). Therefore, the matter of Sunday closings remains in the General Assembly. But, of course, it "may itself determine such an issue for each of its local subdivisions, having in mind the needs and desires of each." Salsburg, 346 U.S. at 552. "It has long been the practice of the Maryland Legislature either to enact local laws or to exempt particular counties from the operation of general laws." *Neuenschwander v. Wash. San. Com.*, 187 Md. 67, 80 48 A.2d 593 (1946); *Stevens v. State*, 89 Md. 669, 674, 43 A. 929 (1899).

> Maryland has followed a policy of thus legislating, through its General Assembly, upon many matters of local concern, including the prescription of different substantive offenses in different counties. The cum-

[3] As to constitutional amendments with respect to home rule and implementing legislation *see*: Md. Const., Art. XI-A (charter counties and Baltimore City), Art. XI-E (municipal corporations), Art. XI-F (code counties); Code (1957, 1973 Repl. Vol., 1979 Cum. Supp.) Art. 25A (chartered counties), Art. 23A (municipal corporations), Art. 25B (code counties).

As the Maryland Constitution now stands no municipal corporation, by any amendment or addition to its charter, may "permit any act which is prohibited by the laws of this State concerning the observance of the Sabbath Day or the manufacture, licensing or sale of alcoholic beverages." Md. Const., Art. XI-E, § 6.

> bersomeness of such centrally enacted legislation as compared with the variations which may result from home rule is a matter for legislative discretion, not judicial supervision, except where there is a clear conflict with constitutional limitations. [*Salsburg*, 346 U.S. at 552-553.]

There is no such clear conflict here any more than there is in the differing requirements as to sales of alcoholic beverages in various counties and cities. Code (1957, 1976 Repl. Vol.) Art. 2 B.

> The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several States without violating the equality clause in the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same State. [*Missouri v. Lewis*, 101 U.S. 22, 31 (1879).]

Since *Lewis* the Supreme Court has given continued recognition to the principle that uniformity throughout the limits of a state is not in and of itself a prerequisite to meeting the requirements of the fourteenth amendment's equal protection clause. *Washabaugh v. Washabaugh*, 285 Md. 393, 407, 404 A.2d 1027 (1979) and cases therein cited; *Davidson v. Miller*, 276 Md. 54, 71-77, 344 A.2d 422 (1975). Equal protection "means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances." *Salsburg*, 346 U.S. at 551, quoting *Lewis* at 31. *See Matter of Trader*, 272 Md. 364, 383-386, 325 A.2d 398 (1974).

To summarize, we agree that territorial classifications, as decisions of this Court indicate,[4] must have a rational basis. But, "a rational basis, and thus constitutionality for equal protection purposes, will be presumed unless 'a clear and convincing showing by the party assailing the legislative classification [proves] that it does not rest upon any reasonable basis, but is essentially arbitrary.'" *Davidson*, 276 Md. at 79, quoting *Trader*, 272 Md. at 400. *See Washabaugh*, 285 Md. at 408. *McGowan* established that territorial classifications in the Maryland Closing Laws had a rational basis. Examining the whole body of those laws, *McGowan*, 366 U.S. at 423, we conclude that the amendments since *McGowan* do not destroy their rational basis so as to render them essentially arbitrary. The evidence here adduced, such as demographic studies, the Maryland Statistical Abstract of 1977 and affidavits of various persons, for example, from residents of Baltimore County, that they shopped on Sunday in counties where stores were open and that they would have shopped in Baltimore County stores on Sunday had they been open, does not persuade us that the statutes now lack a rational basis. The short of it is that as we read *McGowan* the purpose of providing a day on which there shall be a lesser degree of business activity is a valid reason for Sunday closing laws, and the fact that persons in different areas of the State have different desires and needs with respect to the extent of business activity in their areas does not create unreasonable classifications. Consequently, the desire of the populace of a few counties to have no reduction in commercial activity on Sunday whatsoever, does not, under the principles of *McGowan*, require any different result.

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[4] *See* Washabaugh v. Washabaugh, 285 Md. 393, 404-408, 404 A.2d 1027 (1979); Davidson v. Miller, 276 Md. 54, 70-77, 344 A.2d 422 (1975); Matter of Trader, 272 Md. 364, 389-399, 325 A.2d 398 (1974); Bruce v. Dir. Chesapeake Bay Aff., 261 Md. 585, 605-606, 276 A.2d 200 (1971); Md. Coal Etc. Co. v. Bureau of Mines, 193 Md. 627, 642-643, 69 A.2d 471 (1949); Dasch v. Jackson, 170 Md. 251, 269-270, 183 A. 534 (1936).

We hold that § 534 L and § 534 N do not deny equal protection or due process of law.

III

We reject the contention advanced solely by Toys and argued briefly by it, that Maryland's Blue Laws constitute an establishment of religion in violation of the First Amendment to the Constitution of the United States, made applicable to the states by the Fourteenth Amendment, and Art. 36 of the Maryland Declaration of Rights. On this issue we find that *McGowan* is dispositive. It discussed the religion issue exhaustively, 366 U.S. 429-453, and expressly held that "the Maryland statutes are not laws respecting an establishment of religion." *Id.* at 452. It carefully explained that it did "not hold that Sunday legislation may not be a violation of the 'Establishment' Clause if it can be demonstrated that its purpose — evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect — is to use the State's coercive power to aid religion." *Id.* at 453. But the Court found none of these purposes was demonstrated with respect to the statutes as in effect when considered in *McGowan*. We said in our *McGowan* that the

> argument that the Sunday Blue Laws are unconstitutional as violating the right of religious freedom has been answered many times by this and other courts, which have held that the basic purpose of such statutes, with their exceptions, is the civil establishment and regulation of a day of rest from work, not a law respecting the establishment of religion or prohibiting the free exercise thereof, and that the statutes do not offend the First and Fourteenth Amendments to the Constitution of the United States . . . . We have been shown no reason why we should depart from these holdings. [220 Md. at 122-123 (citations omitted).]

The Supreme Court accepted our determination that the statute's then purpose and effect was not to aid religion. 366 U.S. at 449. We have been shown no reason why we

should depart from those holdings now. The amendments to date on their face, or their legislative history, or their operative effect do not demonstrate that the purpose of the Blue Laws, even if changed since 1959, was changed in a way that would use the State's coercive power to aid religion.

Toys makes no distinction in its argument between the establishment of religion clause of the First Amendment to the Constitution of the United States and the declarations of Article 36 of the Maryland Declaration of Rights. Therefore, we need not consider whether the two constitutional provisions are in *pari materia*. In light of Toys' argument, we have assumed *arguendo* that the requirements of the two provisions are identical.

We hold that the Sunday Closing Laws in Maryland do not "constitute the establishment of religion in violation of the First Amendment to the United States Constitution and Article 36 of the Maryland Declaration of Rights."

IV

Article 41 of the Declaration of Rights, Constitution of Maryland, declares "That monoplies are odious, contrary to the spirit of a free government and the principles of commerce, and ought not to be suffered." There seems to be some question as to whether the consitutional ban "extends to anything other than monoplies in the strict sense, that is, an exclusive right or privilege granted by the sovereign," *Grempler v. Multiple List. Bureau*, 258 Md. 419, 424, 266 A.2d 1 (1970), but even if it did, it would not extend to the Sunday Closing Laws as Scott's and Stewart would have it.

> A monopoly within the prohibition of our Declaration of Rights, is a privilege or power to command and control traffic in some commodity, or the operation of a trade or business to the exclusion of others, who otherwise would be at liberty to engage therein, necessarily implying the suppression of competition, and ordinarily causing a restraint of that freedom to

> engage in trade or commerce which the citizen enjoys by common right. A monopoly is more than a mere privilege to carry on a trade or business or to deal in a specified commodity. It is an exclusive privilege which prevents others from engaging therein. A grant of privileges, even though monopolistic in character, does not constitute a monopoly in the constitutional sense when reasonably required for protection of some public interest, or when given in return for some public service, or when given in reference to some matter not of common right. [*Levin v. Sinai Hosp. of Balto.*, 186 Md. 174, 182-183, 46 A.2d 298 (1946).]

Scott's and Stewart may operate on Sunday in Baltimore County with not more than six persons on any one shift equally with others in their class. They may operate in any other county, as far as the closing laws are concerned, to the same extent as all others in their class may operate in the particular county. The desirability of doing so, economically, practically, or otherwise, is a matter of business judgment to be exercised by them, not a matter of law for the courts. *Grempler*, 258 Md. at 430. Section 534L does not favor "small establishments" over "large ones". It does not exclude Scott's and Stewart or others like them from the Sunday market; it simply provides, uniformly, conditions under which they may operate. Section § [sic] 534L and other sections of the Sunday Closing Laws are not and do not result in a grant to one to the exclusion of others, necessarily implying the suppression of competition.

We hold that a monopoly within the contemplation of Art. 41 of the Declaration of Rights is not suffered by § 534 L under which Scott's and Stewart were convicted.

V

Subsection (a) of § 534 L of the Blue Laws gernerally forbids any wholesale or retail establishment to conduct business on Sunday. Subsection (c)3 reads: "Nothing in this section applies to . . . [a]ny business with not more than six (6) persons on any one shift on Sunday." Subsection (d) prescribes: "Nothing in this section is applicable to any person who by reason of his religious

conviction observes a day other than Sunday as his day of rest and actually refrains from labor or secular business on that day." Scott's and Stewart construe these provisions as requiring that a conviction of a wholesale or retail establishment for unlawfully conducting business on Sunday with more than six persons on any one shift include proof by the State that more than six of the persons were not excepted by subsection (d). In other words, they believe that subsection (d) defines "persons" as used in subsection (c)3.[5] We do not read the statute that way.

Section 534 L looks only to "any wholesale or retail establishment" in its proscriptions. Subsection (a). The section does not prohibit conduct by a person except as that person may constitute a business; it does not reach a person as an employee or agent of a business. The sanctions for violation of its provisions are directed to businesses, and insofar as they relate to a person, it is only to a person as a wholesale or retail establishment.[6] Subsection (a) forbids any wholesale or retail establishment to "cause, direct, or authorize any employee or agent to engage in or conduct business on its behalf on Sunday." There is no provision against an employee or agent

[5] If Scott's and Stewart were correct, an establishment otherwise under the restrictions of § 534 L could lawfully operate on Sunday with a shift consisting of not more than six persons who, by reason of their religious convictions, observe Sunday as a day of rest plus any number of persons who, by reason of their religious convictions, observe a day other than Sunday as a day of rest and actually refrain from labor or secular business on that day.

The exclusion in subsection (d) would not permit establishments such as appellants to close on a different day and open on Sunday with more than six employees.

[6] Subsection (j), which establishes fines as the punishment for violations, expressly declares that "[n]othing contained herein shall be construed to permit any fine upon any employee or agent who has been caused or directed by his employer to violate the provisions of this section." But it appears that even an employee or agent freely agreeing to work on Sunday would not be culpable. The section simply does not proscribe any conduct by such person.

conducting business. Therefore, it is mainfest that the exemption in subsection (d) of "any person" who meets the conditions therein set out from the applicability of the section contemplates only persons as wholesale or retail establishments and not as employees or agents of such establishments. It in no way relates to subsection (c)3 as defining or qualifying the word "persons" as used therein. Subsection (d) provides no more than another business exemption to the prohibitions of § 534 L. It is not an element of the crime arising from an establishment operating on Sunday with more than six employees on any one shift. We hold that the State was not required, as a matter of law, to prove that more than six of the employee [sic] of Scott's and Stewart, working on their respective shifts on Sunday were not within the terms of subsection (d).[7]

VI

The Maryland Sunday Blue Laws have been soundly denounced by some persons. They have been characterized as unwise, complex, a patchwork, a crazy qult, a labyrinth, a legal maze, unnecessarily befuddling statutory crabgrass, an inconvenience, a hypocrisy. But even if they were, they could not for those reasons be voided by the judiciary. As we have indicated, absent some constitutional infirmity the judiciary simply has no power to interfere. We have determined that § 534 L and § 534 N, contrary to appellants' contentions, are constitutionally valid. The

[7] Scott's and Stewart argue that what the State would be required to prove under their interpretation of the statute is "that the defendant operated with more than six persons *who observe Sunday as their day of rest.*" What would in fact be required if their contention were valid is proof of operation with more than six persons who do not by reason of their religious conviction observe a day other than Sunday as a day of rest and actually refrain from work or secular business on that day. They err in the assumption that all persons either observe Sunday as a day of rest or, by reason of religious convictions, observe some other day and actually refrain from work or secular business on that day. There are, however, persons with no religious conviction, and persons who, despite a religious conviction calling for a day of rest, do not observe it.

statutes must stand firm until the General Assembly of Maryland changes them. If it concludes that the public welfare requires that Sunday business activities no longer be proscribed in Baltimore County and Anne Arundel County, or in fact in any other county, or city or town, it has the power and the means to effectuate its conclusion.

Judgments Affirmed; Costs To Be Paid By Appellants.

Md. Ann. Code art. 27, § 534N (1976):

Sunday activities in Anne Arundel and Calvert counties.

(a) In Anne Arundel County and Calvert County, except as specifically in this section otherwise provided, it is unlawful on Sunday for any wholesale or retail establishment to conduct business for labor or profit in the usual manner and location or to operate its establishment in any manner for the general public. It shall not cause, direct, permit, or authorize any employee or agent to engage in or conduct business on its behalf on Sunday.

(b) Notwithstanding any provision of this section, the operation of any of the following types of retail establishments is allowed on Sunday.

1. Drug stores whose principal business is the sale of drugs and related items.

2. Delicatessens whose principal business is the sale of delicatessen and related food items.

3. Bakeries and bakeshops.

4. Gasoline stations whose principal business is the sale of gasoline, oil, and other automobile maintenance items.

5. Restaurants, grills and snack bars.

6. Dealers in boats and boating equipment, and dealers in fishing equipment and supplies.

(c) Nothing in this section applies to:

1. Farmers

2. Nurserymen

3. Any business with not more than eight (8) persons on any one shift on Sunday with the exception of persons or retailers engaged in the sale of motor vehicles.

(d) Nothing in this section is applicable to any person who by reason of his religious conviction observes a day other than Sunday as his day of rest and actually refrains from labor or secular business on that day, and whose establishment is closed for business on that day. The term "a day other than Sunday" as used herein shall mean any consecutive twenty-four hour period.

(e) Notwithstanding any provision of this section, any establishment which offers service as its primary business is allowed to operate on Sunday.

(f) Industries where continuous processing or manufacturing is required by the very nature of the process involved are allowed to operate on Sunday.

(g) All recreational activities, sports, and amusements are permitted on Sunday.

(h) Nothing in this section shall be deemed or construed to amend other provisions of law with reference to the prohibition of work, sport, business, alcholic beverage sales, or the service of process on Sunday.

(i) The State's Attorney of Anne Arundel County, and Calvert County, as the case may be, may petition the circuit court of such county to enjoin any violation of this section.

(j) Any person, firm or corporation violating the provisions of this section is guilty of a misdemeanor and, upon conviction, is subject to the following penalties. A conviction under this section is to be punished by a fine not to exceed one thousand dollars ($1,000.00), for each employee caused, directed, permitted or authorized to work in violation of this section. Nothing contained herein shall be construed to permit any fine upon any employee or agent who has been caused or directed by his employer to violate the provisions of this section.

EXCERPT FROM DOCKET SHOWING JUDGMENT BELOW

Apr. 9 — Court trial (Judge Hopper), Plea Not Guilty, Stipulation read, Court denies Def. motion for Judgment of Acquittal, Court denies Def. renewed motion at end of entire case, Finding Guilty, Court fines Def. $1,000.00 & to pay Court costs.

NOTICES OF APPEAL

In The
Court of Appeals of Maryland

September Term, 1979

Nos. 63 and 72 (Consolidated)

(In the Circuit Court of Maryland for
Anne Arundel County
Criminal No. 21,917)

Supermarkets General Corporation t/a Hochschild Kohn Department Store,

Appellant,

v.

State of Maryland,

Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Pursuant to Rule 10 of the Revised Rules of the Supreme Court of the United States, notice is hereby given that Supermarkets General Corporation t/a Hochschild Kohn

Department Store is taking an appeal to the Supreme Court of the United States from the judgment of the Court of Appeals of Maryland entered against it on December 24, 1979, affirming the judgment of conviction entered against the appellant on April 9, 1979, by the Circuit Court of Maryland for Anne Arundel County.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

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Filed March 19, 1980

In The
Circuit Court of Maryland For Anne Arundel County

Criminal No. 21, 917

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Filed March 19,1980

Supreme Court, U. S.
FILED
JUN 4 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1483

SUPERMARKETS GENERAL CORPORATION T/A
HOCHSCHILD KOHN DEPARTMENT STORE,
Appellant,

v.

STATE OF MARYLAND
Appellee.

ON APPEAL FROM THE
COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1483

SUPERMARKETS GENERAL CORPORATION T/A
HOCHSCHILD KOHN DEPARTMENT STORE,
Appellant,

V.

STATE OF MARYLAND
Appellee.

ON APPEAL FROM THE
COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to Rule 16 of the Rules of the Supreme Court, moves that the decision of the Court of Appeals of Maryland be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

STATEMENT

On 13 December, 1978, Appellant was charged with operating a retail business establishment on Sunday in violation of Article 27, Section 534N of the Annotated Code of Maryland. On 9 April, 1979 Appellant was convicted in the Circuit Court of Maryland for Anne Arundel County. A writ of certiorari was granted by the

Maryland Court of Appeals before argument and decision in the Maryland Court of Special Appeals. In an opinion filed 24 December, 1979, the Maryland Court of Appeals unanimously affirmed Appellant's conviction and found that the provisions of Article 27, Section 534N did not violate the United States Constitution. That opinion is reported at 286 Md. 611, 409 A.2d 250 and is reprinted in the appendix of Appellant's jurisdictional statement.

ARGUMENT

The Court of Appeals of Maryland was clearly correct in finding that the provisions of Article 27, Section 534N did not offend the United States Constitution. The decision was but one holding in a long line of Maryland cases affirming directly or indirectly the constitutionality of the State's Sunday closing laws.[1]

This Court considered the constitutionality of Maryland's Sunday closing laws in *McGowan v. Maryland*, 366 U.S. 420 (1961). In that decision this Court noted that the Sunday closing laws contained "a myriad of exceptions for various counties, districts of counties, cities and towns throughout the state", *Id.* at 424, and went on to hold that "the Fourteenth Amendment permits the State a wide scope of discretion in enacting laws which affect some

[1] *See Steimel v. Board of Education*, 278 Md. 1, 357 A.2d 386 (1976), *Dart Drug Corp. v. Hechinger Co.*, 272 Md. 15, 320 A.2d 266 (1974); *Giant of Maryland, Inc. v. State's Attorney for Prince George's County*, 267 Md. 501, 298 A.2d 427, *appeal dismissed*, 412 U.S. 915 (1973), *Rebe v. State's Attorney for Prince George's County*, 262 Md. 350, 277 A.2d 616 (1971); *Richards Furniture Corp. v. Anne Arundel County Board of County Commissioners*, 233 Md. 249, 196 A.2d 621 (1964); *McGowan v. State*, 220 Md. 117, 151 A.2d 156 (1959); *Ness v. Supervisors of Elections*, 162 Md. 529, 160 A. 8 (1932); *State v. Maryland Club*, 105 Md. 585, 66 A. 667 (1907); and *Atlantic Department Stores v. State's Attorney for Prince George's County*, 22 Md. App. 381, 323 A.2d 617 (1974).

groups of citizens differently than others", *Id.* at 425. This Court further explained its decision by saying that:

> . . .We have held that the Equal Protection Clause relates to equality between persons as such, rather than between areas and that territorial uniformity is not a constitutional prerequisite. With particular reference to the State of Maryland, we have noted that the prescription of different substantive offenses in different counties is generally a matter for legislative discretion, we find no invidious discrimination here; *citing Salsburg v. Maryland*, 346 U.S. 545 (1954).

Id. at 427.

In an oft-cited concurring opinion on the history and purposes of Sunday blue laws, Justice Frankfurter took note of cases "sustaining state statutes applicable in some, but not all, localities . . ." 366 U.S. at 532 N. 135, and stated:

> Many of the jurisdictions which have Sunday laws provide some form of local option procedure for the creation of exceptions. This is only to recognize the obvious fact that conditions of limited geographical range may be determinative in striking the balance of forbidden and permissible Sunday activity which best accords with popular habits and desires. In Maryland the State Legislature itself does the job of adapting the general state-wide law to the local circumstances. This difference in method can scarcely entail different federal constitutional consequences.

Id. at 537 N. 138.

Since that decision, this Court has consistently summarily affirmed decision upholding Sunday closing laws, or dismissed appeals of such decisions or denied certiorari.[2]

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[2] *See, e.g., Giant of Maryland, Inc. v. State's Attorney for Prince George's County*, 267 Md. 501, 298 A.2d 427, *appeal dismissed*, 412 U.S. 915 (1973); *Spartan's Industries, Inc v. State*, 447 S.W.2d 407 (Tex.), *appeal dismissed*, 397 U.S. 590 (1970); *Sundaco, Inc. v. State*, 445 S.W.2d 606 (Tex.), *appeal dismissed*, 397 U.S. 591 (1970); *Zayre of Georgia, Inc. v. City of Marietta*, 416

Appellant claims that since the Maryland statutory scheme provides for different Sunday closing laws for different counties the precepts of the United States Constitution are violated. This Court has long held that there need not be uniformity of law as between political subdivisions.

McGowan v. Maryland, 366 U.S. 420 (1961) upheld a statute permitting Sunday sales of certain items in Anne Arundel County but prohibiting such sales elsewhere. This Court wrote:

> Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, there laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

366 U.S. at 425-426.

In *McGowan v. Maryland, supra*, this Court also clearly stated "we have held that the Equal Protection Clause relates to equality between persons as such, rather than between areas and that territorial uniformity is not a constitutional prerequisite",[3] 366 U.S. at 427. This Court

F.2d 251 (5th Cir. 1969), *cert. denied*, 397 U.S. 918 (1970); *Whitney Stores, Inc. v. Summerford*, 280 F. Supp. 406 (D.S.C.), *aff'd*, 393 U.S. 9 (1968); *Solomon v. South Carolina*, 245 S.C. 550, 141 S.E.2d 818, *appeal dismissed*, 382 U.S. 204 (1965).

[3] There is some authority that equal protection principles simply do not apply if classifications are based on geographical factors, *Hogan v. Rosenberg*, 24 N.Y.2d 207, 299 N.Y.S.2d 424, 247 N.E.2d 260 (1969), *rev'd on other grounds sub. nom. Baldwin v. New York*, 399 U.S. 66 (1970), *Mathis v. North Carolina*, 266 F. Supp. 841 (M.D.N.C. 1967). *See also Muzquiz v. City of San Antonio*, 378 F. Supp. 949 (W.D. Tex. 1974).

referred to *Salsburg v. Maryland, supra*, in which it had stated that "The Equal Protection Clause relates to equality between persons as such rather than between areas" "was established long ago" in *Missouri v. Lewis*, 101 U.S. 22 (1880), 346 U.S. at 551. In upholding a statute providing for a state appellate court system that differed between counties, this Court had said in *Missouri v. Lewis*:

> [T]here is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution, of the United States to prevent its doing so. This would not, of itself, within the meaning of the Fourteenth Amendment, be a denial to any person of the equal protection of the laws. * * * It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.

101 U.S. at 31. *See also Hayes v. Missouri*, 120 U.S. 68 (1887), rejecting an equal protection attack on a state statute providing for a different number of peremptory challenges in capital cases depending on the location of the trial.

Prior to *McGowan* this Court had considered an analogous Maryland statutory scheme in *Salsburg v. Maryland*, 346 U.S. 545 (1954). That decision concerned a statute permitting illegally seized evidence to be used in gambling misdemeanor prosecutions in Anne Arundel County.[4] Similar evidence could not be used elsewhere in the State.

[4] At that time the exclusionary rule was not yet applicable to the states and hence each state could determine its own rules with respect to illegally acquired evidence. Such a statute could not now stand in light of *Mapp v. Ohio*, 367 U.S. 643 (1961).

The Court quoted *Missouri v. Lewis* extensively and found that the law did not violate the equal protection clause. It noted that:

> There seems to be no doubt that Maryland could validly grant home rule to each of its 23 counties and to the City of Baltimore to determine this rule of evidence by local option. It is equally clear, although less usual, that a state legislature may itself determine such an issue for each of its local subdivisions, having in mind the needs and desires of each. Territorial uniformity is not a constitutional requisite. *Ocampo v. United States*, 234 U.S. 91, 98-99.

346 U.S. at 552.

More recently in *Griffin v. School Board of Prince Edward County*, 372 U.S. 218 (1964), this Court noted again that "[A] State, of course, has wide discretion in deciding whether laws shall operate statewide or shall operate only in certain counties, the legislature 'having in mind the needs and desires of each.'" 377 U.S. at 231.

In determining whether the State's Sunday closing laws had a rational basis, the Maryland Court of Appeals held that the changes in the statutory scheme allowing for different laws applicable in different counties did not render the statute(s) unconstitutional. The Court of Appeals wrote:

> . . . we conclude that the amendments since *McGowan* do not destroy their rational basis so as to render them essentially arbitrary. The evidence here adduced, such as demographic studies, the Maryland Statistical Abstract of 1977 and affidavits of various persons, for example, from residents of Baltimore County, that they shopped on Sunday in counties where stores were open and that they would have shopped in Baltimore County stores on Sunday had they been open, does not persuade us that the statutes now lack a rational basis. The short of it is that as we read *McGowan* the purpose of providing a day on

> which there shall be a lesser degree of business activity is a valid reason for Sunday closing laws, and the fact that persons in different areas of the State have different desires and needs with respect to the extent of business activity in their areas does not create unreasonable classifications. Consequently, the desire of populace of a few counties to have no reduction in commercial activity on Sunday whatsoever, does not, under the principles of *McGowan*, require any different result.

286 Md. at 623-624, 409 A.2d at 257.

In essence, the words of Justice Frankfurter in *McGowan* nearly two decades ago point up the defect in Appellant's case and the justification for the Maryland statutes:

> There is presented in this record not a trace of evidence as to the habits and customs of the population of Maryland or of Anne Arundel County, nothing that suggests that the pattern of legislation which their representatives have devised is not reasonably related to local circumstances determining their ways of life. Appellants have wholly failed to meet their burden of proof.

366 U.S. at 536-37.[5]

This Court has consistently ejected appeals and petitions urging it to review Sunday closing laws in various cases.[6] Although three State courts have invalidated their own state Sunday closing laws, they did so on a basis not

[5] There was some evidence of the habits of the residents of Baltimore County introduced during the trial of one of Appellant's co-appellants in the Maryland Court of Appeals. There was, however, no evidence of the habits of the people of Anne Arundel County.

[6] See footnote 2, *supra*.

present in this case.[7] The overwhelming majority of state courts have upheld the constitutionality of Sunday closing laws.[8]

This Court has written that "[w]hen local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory distinctions", *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). This is because

> States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinction may be made with substantially less than mathematical exactitude . . . . in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.

427 U.S. at 303-04. It has further noted that it is by now absolutely clear that the Due Process Clause does not empower the judiciary "to sit as a superlegislature to weigh the wisdom of legislation, *Ferguson v. Skrupa*, 372

[7] *Caldor's, Inc. v. Bedding Barn, Inc.*, 40 Conn. L. J. 41, 47 U.S.L.W. 2669 (Conn. 10 April, 1979), *Kroger Co. v. O'Hara Township*, 481 Pa. 101, 392 A.2d 266 (1978), and *People v. Abrahams*, 40 N.Y.2d 277, 353 N.E.2d 574 (1976) all concerned differences in commodities available for sale not territorial distinctions.

[8] *See, e.g., Vornado, Inc. v. Hyland*, 77 N.J. 347, 390 A.2d 606 (1978); *Malibu Auto Parts v. Commonwealth*, 218 Va. 453, 237 S.E.2d 782 (1977); *Zayre Corp. v. Attorney General*, 372 Mass. 423, 362 N.E.2d 878 (1977); *Gibson Products Company, Inc. v. State*, 545 S.W.2d 128 (Tex. 1976), *cert. denied*, 431 U.S. 955 (1976); *Genesco, Inc. v. J.C. Penney Co., Inc.*, 313 So.2d 20 (Miss. 1975); *Caiola v. City of Birmingham*, 288 Ala. 486, 262 So.2d 602 (1972); *Brown Enterprises, Inc. v. Fulton*, 192 N.W.2d 773 (Iowa 1972); *State v. Giant of St. Alban's, Inc.*, 128 Vt. 539, 268 A.2d 739 (1970); and *City of Bismarck v. Materi*, 177 N.W.2d 530 (N.D. 1970). *Vornado, Malibu Auto Parts, Caiola*, and *Materi* all involve some form of territorial distinction as to the applicability of Sunday closing laws.

U.S. 726, 731," *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124 (1978).

As there is a rational basis for providing different laws for different geographical areas of Maryland, the Maryland Court of Appeals properly found the Sunday closing laws constitutional and correctly suggested that if the laws were to be modified, the General Assembly of Maryland had the power and the means to do so.[9]

Appellee respectfully submits that this appeal does not present a substantial question and requests that the decision of the Maryland Court of Appeals be affirmed.

Respectfully submitted,

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[9] The General Assembly has already done so. During the 1980 legislative session, the General Assembly enacted legislation that established a generally uniform Sunday closing law that would apply to Anne Arundel County, Howard County, Baltimore County and Baltimore City. A key feature of this legislation was the provision that "suspended" its operation on the four Sundays preceding Christmas. The Governor of Maryland signed this legislation on 27 May, 1980.

Supreme Court, U. S.
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OCTOBER TERM, 1979

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SUPERMARKETS GENERAL CORPORATION T/A
HOCHSCHILD KOHN DEPARTMENT STORE,
Appellant,

V.

STATE OF MARYLAND
Appellee.

ON APPEAL FROM THE
COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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ARGUMENT

The Motion to Dismiss or Affirm rests essentially upon the statement in *McGowan v. Maryland,* 366 U.S. 420, 427 (1961), that "the Equal Protection Clause relates to equality between persons as such, rather than between areas and . . . territorial uniformity is not a constitutional prerequisite." However, this ignores that Maryland's present scheme of blue laws rests upon an unequal distribution of the referendum power. This scheme is different in kind from the territorial differences addressed in *McGowan,* and constitutes invidious discrimination in violation of the Equal Protection Clause.

This Court has held that when governmental decisions are made by a process that does not represent all of the people, the general presumption of constitutionality of legislation is not applicable. *Kramer v. Union Free School District,* 395 U.S. 621, 627-28 (1969). The reason is that "the presumption of constitutionality and the approval given 'rational' classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all of the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as a basis for presuming constitutionality." *Id.* at 629.

The Maryland blue laws are not enacted in a way which fairly represents all of the people, and therefore should not be presumed to be constitutional. The Maryland General Assembly has retained the power to legislate blue laws. *Steimel v. Board,* 278 Md. 1, 8, 357 A.2d 386, 391 (1976). In so legislating, it represents all of the qualified voters of the state. However, by favoring selected counties with the referendum, it has permitted the exercise of this legislative power by the vote of less than all qualified voters.

Statutory schemes which selectively grant or withhold the right to vote are subject to strict judicial scrutiny to "determine whether the exclusions are necessary to promote a compelling state interest." *Kramer,* 395 U.S. at 627; *Cipriano v. City of Houma,* 395 U.S. 701, 704 (1969); *Phoenix v. Kolodziejski,* 399 U.S. 204, 208-209 (1970). Moreover, such classifications must be drawn with precision, so that the exclusion of the disfavored class is "necessary to achieve the articulated state goal," and those with a vital interest in the outcome are not excluded *Kramer,* 395 at 632-633; *Phoenix,* 399 U.S. at 208-209; *Cipriano,* 395 U.S. at 704.

In the instant case, there is no rational basis for or legitimate state interest in favoring some counties and not

others by the grant of referendum power over Sunday closings. Therefore, it is discriminatory. Because the challenged legislation under which appellant was convicted is a product of this discrimination, it should be invalidated.

CONCLUSION

No case has been found in which this Court has decided whether the Equal Protection Clause prohibits local option legislation where, as here, the option is granted to voters in some, but not all, political subdivisions of a state. For the reasons stated above and in the Jurisdictional Statement, appellant urges that the Court deny the Motion to Dismiss or Affirm and grant plenary consideration with briefs and oral argument.

Respectfully submitted,

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